IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. AMERICAN STOCK EXCHANGE,LLC; CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED;PACIFIC EXCHANGE, INC.; and PHILADELPHIA STOCK EXCHANGE, INC. *Defendants.*	)	Civil Action No.

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On September 11, 2000, the United States filed a civil antitrust Complaint alleging that the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants are option exchanges that provide a forum on which their members trade options. An option is the right either to buy or to sell a specified amount or value of a particular underlying interest (equity security, stock indices, government debt securities or foreign currencies) at a fixed exercise price by exercising the option before its specified expiration date. An equity option is one in which the underlying interest is an equity security. Since the early 1990s, exchanges have been permitted to list options on any equity security that meets certain listing criteria. The Complaint alleges that, beginning in the early 1990's, an agreement arose among the defendants to limit competition among themselves by not listing options that were already listed on another exchange.

On September 11, 2000, the United States and the defendants filed a Stipulation in which they consented to the entry of a proposed Final Judgment that requires defendants to eliminate the anticompetitive conduct identified in the Complaint. Specifically, the proposed Final Judgment prevents the defendants from allocating equity options between or among exchanges or from agreeing that an equity option will be traded exclusively on any one exchange. The proposed Final Judgment also prohibits an exchange from maintaining any rule, policy, practice, or interpretation that directly prohibits, or that has the purpose and an effect of indirectly prohibiting, the multiple listing of equity options. Further, the Final Judgment enjoins defendants from retaliating, harassing or intimidating any exchange or member of an exchange for listing an equity option or introducing a new equity option product.

The United States and the defendants have agreed that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action except that the Court would retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

Defendants have also reached an agreement with the Securities and Exchange Commission (“SEC” or “Commission”) to resolve issues raised by that agency’s investigation of the options industry. The SEC’s investigation has been resolved through the SEC’s issuance of an Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions against the defendants (“SEC Order”). SEC Release No. 43268, September 11, 2000. The SEC Order was issued essentially simultaneously with the filing of the Department’s Complaint in this matter. The Department and the Commission cooperated in their investigations and coordinated the settlements of them. The SEC Order includes significant provisions that require changes in the ways exchanges interact and conduct business, which will correct some of the past practices of the exchanges that facilitated the multi-listing agreement and will ensure additional competition in these markets going forward.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Background on options trading.

Each defendant is independent and competes against the other defendants in listing options. Defendants provide a forum (commonly known as a "floor") on which their members trade options. Exchanges compete for orders by, among other things, offering lower transaction fees and higher quality services, including quicker execution and greater liquidity, than their competitors. In addition, exchange members making a market in a particular option compete with other market makers, on that exchange and on other exchanges on which the option is listed, in the prices they offer to buy and sell options.

An exchange's quoted prices to buy and sell a given option are the best prices available from the multiple market makers on a floor of the exchange (referred to as a "crowd"). An exchange's quoted price to buy an option (its "bid") and price to sell (its “ask”) are transmitted to the Options Price Reporting Authority (“OPRA”), which transmits the information, combined with information from the other options exchanges, to third parties for processing and distribution. This information is used by market makers in setting prices and by the public in making investment decisions. At any given time, any exchange may have the best bid or ask in a particular option.

One of the ways market makers seek to profit from their market making activities is from the difference between their bid and ask, i.e., the difference between their price to buy and sell the same option, which is referred to as the spread. A wider spread in an option generally results in less favorable prices to investors. Competition between exchanges for the business of investors has the effect of narrowing spreads.

Prior to January 20, 1990, SEC rules prohibited, with few exceptions, equity options from being traded on more than one exchange. The SEC subsequently rescinded these rules and adopted Rule 19c-5. This action was taken in part based on the SEC belief that investors would benefit from options being multiply listed. From January 20, 1990, going forward, the SEC contemplated that each exchange would be permitted to list any equity option as long as its underlying security met specific criteria, such as having a trading history and sufficient activity, to make it eligible for listing as an option.

Equity options were opened to multiple listing over a period of time. Exchanges were permitted to multiply list "new" options, i.e., options whose underlying security interest had not previously been listed on any exchange, without limitation. Approximately 700 options that had been allocated to specific exchanges prior to January 20, 1990, were opened to multiple listing in phases over a period from late 1992 to late 1994. When the last phase ended in late 1994, all equity options could be listed and traded by any of the defendants.

B. Illegal Agreement to Allocate Options.

In the early 1990s defendants, and others not named in this Complaint, agreed to limit competition among themselves by not listing options that were already listed on another exchange. The Department's investigation determined that from the early 1990s until at least the summer of 1999 a significant number of the industry's most actively-traded options were listed on a single exchange. During this period, there was tremendous growth in options trading which should have made multiple listing more attractive. Absent an agreement, it would have sometimes been in the economic self-interest of an exchange, freely competing with other exchanges, or in the interests of its members, to list options traded on another exchange. The Department's investigation uncovered significant evidence that the exchanges reached an agreement that no exchange would list an option already listed elsewhere.

The Joint Exchange Options Plan

Following the adoption of Rule 19c-5, the defendants adopted procedures for listing new equity options. These procedures were contained in the "Joint-Exchange Options Plan" ("Options Plan"). The Options Plan required each exchange to pre-announce its intention to list a new equity option class, established a twenty-four hour time frame for other exchanges to announce their intention to list the same option, and provided waiting periods before any exchange could start trading. The Options Plan also provided that if an exchange was not the first exchange to announce an intent to list or did not submit a notice of intent to list within the twenty-four hour period following the initial notice (referred to as the "initial listing window" herein), it had to wait until at least the eighth business day after the date of the initial notice before it could list and begin trading the option.

The Options Plan was central to the agreement among the exchanges. Although the language of the Options Plan provided that an exchange could list and begin trading previously listed options after waiting eight days, defendants undertook to develop additional procedures to govern the multiple listing of equity options already listed on an exchange. Beginning in 1992, defendants engaged in protracted discussions regarding the development of such procedures.

By the end of 1994, when the last most actively-traded options were about to become available for multiple listing,[1] the proposed procedures for listing existing options had become complex and highly restrictive. The exchanges could not agree on ground rules for multiple listing and active discussion of multiple listing ceased. The interpretation of the Options Plan adopted by the exchanges and the absence of an agreed-upon procedure meant that no exchange would engage in multiple listing, other than listing new options in the initial listing window.

[1] The exchanges were allowed to choose the order in which their exclusives would become available for multiple trading in the phase out period. The exchanges uniformly chose to open their exclusives to the possibility of multiple listing based on trading volume, with the most actively traded, and therefore most vulnerable to multiple listing, made available last, in late 1994.

During the course of defendants' discussions about the Options Plan, an agreement between and among defendants developed that each defendant would refrain from listing equity options classes that were already listed on another exchange. Pursuant to this agreement, each defendant exchange would refrain from listing equity option classes that were already listed on another exchange. The exchanges were able to preserve the agreement by, among other things, the actions set forth below.

Listing Committee Procedures

Beginning in the early 1990's, exchange employees uniformly avoided considering option classes already traded elsewhere for listing on their exchange. The internal procedures for assessing listing opportunities at the several exchanges excluded consideration of options already listed on another exchange. In addition, employees responsible for listings at each of the exchanges did not consider listing an option already listed on another exchange. Rather, these employees limited themselves to considering options that (1) were becoming eligible for listing or (2) for which they had received notice that another exchange was going to list and for which they had a one-day opportunity to join in listing, or challenge the listing of, under the terms of the Options

Plan.

In addition, exchange members who wished to have their exchange begin to list an option that was already traded elsewhere had no formal means to bring their requests to exchange listing committees for consideration. Nevertheless, on a few occasions, market makers or broker/dealers sought to induce an exchange to list an option listed on another exchange. These requests were always rejected.

Corporate Mergers

A recurring threat to the agreement was a situation in which a company whose options were exclusively traded on one exchange merged with a company whose options were traded exclusively on another. To deal with such situations, the exchanges adhered to a protocol for determining which exchange would assume responsibility for the options of the merged company.

Generally, the protocol provided that, in stock transactions, when the acquiring and acquired companies were of different sizes, the exchange on which options of the larger company were listed would continue to trade the option and the exchange on which the options of the smaller company were listed would not. As a result, in many cases, an exchange would not trade options on a merging company even though it was in a good position to compete for such trades. On occasion, exchanges would utilize the Options Clearing Corporation ("OCC") to act as an arbiter of which exchange would list an option following a merger.

Coordination, Threats, Intimidation and Harassment

Changes in market conditions sometimes strained the agreement. As option markets evolved, each exchange's incentives changed and, at one time or another, one of the exchanges considered taking action that would threaten the agreement. In one instance, an exchange considered multiple listing in an effort to increase the volume of options traded on its floor. Other threats to the agreement, during the course of the decade, were posed by exchanges that considered violating the merger protocol or considered listing new option products that might substitute for exclusives on other exchanges.

In each instance identified during the Department's investigation, the exchange about to take action that might have contravened the agreement did not do so. In many instances, there was some form of communication between the exchange about to take the step and another exchange. Generally, employees of one exchange would contact employees of a second exchange and ensure that the second exchange did not encroach on listings allocated to the first by the agreement.

Further, in other instances, one exchange would pressure another, or the market makers on that exchange, in some way in order to stop a threat to the agreement. Generally, the threats involved the promise of retaliatory listing of valuable exclusives or some other form of economic harm to the exchange or market maker. In sum, threats, intimidation and harassment helped preserve the agreement.

Use of OPRA to Preserve the Agreement

The defendant exchanges also relied on their joint participation in OPRA to reduce threats to the agreement. OPRA is jointly controlled by the four defendant exchanges. It contracts with the Securities Industry Automation Corporation to consolidate and transmit information on quotes and transactions from the exchanges to third parties, who send it to investors, brokerage houses and back to the exchanges. In this process, OPRA acts as the exchanges’ agent to acquire the message capacity needed to accept and forward the quote and transaction information generated by the exchanges. Decisions on the amount of message capacity OPRA will acquire and how it is allocated among exchanges are reached jointly by the defendant exchanges.

Historically, this structure gave exchanges the ability to jointly control the amount of message capacity available to each exchange. Because of the operation of OPRA, the exchanges were collectively able to limit capacity, which discouraged multiple listing.

Break Down of the Agreement

In November 1998, the Department opened an investigation into allegations of collusion among the four existing options exchanges. The SEC also opened an investigation of the options markets. In the summer of 1999, all the defendants began to list many options that were already listed on another exchange. The exchanges' change in behavior cannot be explained by concurrent changes in the market or the fundamentals of the underlying stocks.

Effects of the Agreement

The purpose and effect of the agreement was to limit competition among exchanges in the purchase and sale of options. As a result of the agreement, price competition among the defendants and co-conspirators in the purchase and sale of some options was unreasonably restrained. In addition, consumers were denied the benefits of lower transaction fees and higher quality executions, including quicker executions and greater liquidity that would have occurred had the exchanges competed by multiply listing equity options. In sum, investors who have purchased or sold options that would have been multiply listed were deprived of the benefits of free and open competition in the purchase and sale of options.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

Agreements

The proposed Final Judgment (Section IV.A) ensures that defendants do not enter into, continue or reinstate agreements among themselves relating to whether, or the circumstances under which, options will be listed on a particular exchange. To this end, it enjoins each defendant from agreeing with another exchange, directly or indirectly, to trade an option class exclusively on one exchange, to allocate any option class between or among exchanges or to require, prevent or limit the listing or delisting of any option class. This provision would also preclude agreements like the protocol governing corporate mergers and covers agreements with all existing and future exchanges.

Rules, Practices and Procedures

The proposed Final Judgment (Section IV.B) also prohibits any defendant from maintaining any rule, policy, practice or interpretation that directly prohibits or that has the purpose and effect of indirectly prohibiting it from listing an option class because the option class is listed on another exchange. This provision is meant to preclude the development of internal exchange procedures, like those uncovered in the investigation, that effectively prevented exchange employees and members from having an option already listed elsewhere be listed on an exchange. Having such procedures in place helped preserve the agreement among the exchanges.

Threats, Harassment and Intimidation

The proposed Final Judgment (Section IV.C) bars each of the defendants from threatening to retaliate, retaliating against, harassing or intimidating any exchange or any exchange member because it begins to list or trade an option class. It also forbids such conduct in response to an exchange seeking to increase OPRA capacity or an exchange or exchange member seeking to introduce a new options product. This provision will ensure that the exchanges cannot use such tactics in the future to discourage competitive behavior or enforce anticompetitive agreements.

Exceptions

The proposed Final Judgment includes a section designed to ensure that the Final Judgment is not construed to prohibit certain conduct. Specifically, Section V.A states that the proposed Final Judgment shall not be construed to prohibit conduct expressly permitted by statute, SEC rule, SEC order, exchange rule or authorized by SEC personnel. Authorized by SEC personnel means, for purposes of the decree, that the conduct has been explicitly described to the SEC in writing, and about which the SEC has stated, in a writing signed by a person at the Director level or higher, that it has no objection to such conduct or otherwise approves it. Conduct is also “authorized by SEC personnel” if it has been expressly requested to be undertaken in a writing signed by a person at the Director level or higher.

Section V.B provides that the decree does not prohibit any defendant from making unilateral business decisions, reflecting independent business judgment based upon factors set forth in SEC approved rules, regarding whether to list or delist an option class, whether to introduce a new option product, or whether to increase or decrease capacity to list option classes.

Nor does the proposed Final Judgment (i) address the legality of a merger, or acquisition of another exchange, or a legitimate joint venture between a defendant exchange and a non-defendant (Section V.C); (ii) limit defendants’ right to petition in accordance with the doctrine established in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and its progeny (Section V.D); or (iii) prohibit an exchange member from engaging in normal business activity such as unilaterally setting the spreads, quantities or prices at which such member will trade any option or communicating terms at which he or she is willing to trade any option, for the purpose of exploring the possibility of a purchase or sale of such option (Sections V.E and V.F). Finally, the Final Judgment does not prohibit defendant exchanges from undertaking surveillance or taking action in conjunction with the Intermarket Surveillance Group (Section V.G).[2]

Additional Relief

The proposed Final Judgment would further require each defendant to establish and maintain an antitrust compliance program (Section VI). Under the compliance program, an Antitrust Compliance Officer, to be appointed by each defendant, is required to distribute copies of the Final Judgment to certain personnel, including members of a defendant's board of directors or governors, all officers and

[2]The Intermarket Surveillance Group is an exchange organization formed to detect illegal activity occurring across the options exchanges.

all employees and members whose responsibilities include selecting option classes to be listed, developing new options products or surveillance, enforcement or ensuring compliance with laws and regulations. The Antitrust Compliance Officer must also brief defendant’s personnel on the meaning and requirements of the federal antitrust laws and the meaning of the Final Judgment, as well as obtain their certification that they have read and agree to abide by the Final Judgment and understand the penalties for non-compliance.

The Final Judgment further provides that the United States may obtain information from defendants concerning possible violations of the Final Judgment (Section VIII.A and B). Each Antitrust Compliance Officer is required to submit an annual report that details each request made to list an option and what action was taken in response to the request, and to provide information on each allegation of harassment in possible violation of Section IV.C and what efforts were undertaken to investigate it (Section VIII.C). Defendants are required to report semi-annually on each option that has been listed or delisted (Section VIII.D).

In order to facilitate monitoring of regulatory filings that may affect the Final Judgment, the Final Judgment provides that each defendant must submit to the Department copies of any filing or submission to the SEC that relates to compliance with Section IV of the decree, or Sections IV.B.(a),(b),(c),(h) or (j) of the SEC Order (Section VIII.E). The obligation extends to any request, formal or informal, to the SEC, including any request for extension of time or additional time for compliance. This will allow the Department to consult with the SEC on proposed changes to provisions of the SEC Order that are important to promoting competition.

SEC action

The Department determined that, because of the important role played by the SEC in regulating this industry, various corrective actions needed to prevent the recurrence of the agreement alleged in the Complaint and to promote competition could best be addressed by the SEC. Some activities or changes in activities that were needed required new rules or rule modifications that would need to be filed with and reviewed by the SEC. The Department, therefore, has worked with the SEC to see that needed corrective actions were included in the SEC Order.

For example, the Options Plan needed to be modified to make it less useful as a way to signal the intent of an exchange to multi-list or to allow one exchange to delay another from listing a particular option. The best way to address this problem was to require defendants to propose revisions to the Options Plan that will eliminate the opportunity to engage in anticompetitive conduct and for the SEC to conduct a rulemaking proceeding to revise the Options Plan. Consequently, in Section IV.B.(a) of the SEC Order, the defendants have committed to submit rules eliminating anticompetitive provisions of the Options Plan no later than 90 days after entry of the SEC Order.

Similarly, the absence of procedures for exchange members to get prompt consideration of multiple listing proposals is best addressed by requiring defendants to formulate procedural rules that would provide for the submission and processing of such requests. Therefore, in Section IV.B.(b) of the SEC Order, defendants have committed to submit rules establishing such procedures no later than 120 days after entry of the SEC Order. The rules to be submitted will require each exchange to specify the criteria it will use to consider such requests and to respond to such requests in writing within a specified time frame.

As noted above, OPRA, as traditionally managed, has served to create a shared industry capacity for the dissemination of quote and trade data in the options markets.

This approach has led to a situation where the exchange participants in OPRA have managed data transmission capacity growth and allocation as a joint endeavor. Thus, each competitor has had knowledge of every other competitor's capacity plans and needs and, by acting jointly, the exchanges can thwart competitors' plans by failing to provide needed capacity.

The Department believes that the option industry must be required to move away from the shared capacity paradigm in order for competition to significantly increase. To that end, defendant exchanges have agreed to move to a system in which each exchange can acquire and manage its own data transmission capacity independently. Significant changes in the rules under which OPRA operates are necessary in order to achieve this result. Specifically, defendants have agreed, as a part of the SEC Order, to modify the structure and operation of OPRA to (i) establish a system for procuring and allocating data transmission capacity that eliminates joint action by the participants in OPRA in determining the amount of total capacity procured and the allocation thereof, and provides that each participant in OPRA will independently determine the amount of capacity it will obtain; (ii) establish a system for gathering and disseminating business information from and to participants of OPRA such that all non-public information specific to a participant in OPRA shall remain segregated and confidential from other participants; and (iii) set forth a statement of OPRA's functions and objectives and provide for rules and procedures that limit any joint action by the participants in OPRA to circumstances in which such joint action is necessary in order to fulfill the stated functions and objectives. SEC Order Section IV.B.(c). Defendants have committed to submit rules establishing such procedures no later than seven months after entry of the SEC Order.

The defendants have also agreed, as part of the SEC order, to increase transparency on the activities on their trading floors. Specifically, Section IV.B.(j) of the SEC order requires that any practice or procedure, not currently authorized by rule, by which any market makers trading any particular option class determine by agreement the spreads or option prices at which any particular option class, or the allocation of orders in an option class, be filed for approval within six months of the date of the SEC order. The defendants have committed to stop any such practice or procedure that is not submitted to and ultimately approved by the Commission. This obligation will ensure that market maker practices concerning spreads, option prices and order allocations are permitted by the SEC and are publicly known. This will promote competition between market makers to the benefit of investors.

Other provisions of the SEC Order will also promote competition. In this regard, the SEC Order provides for significant increases in expenditures for surveillance activities by the defendants, particularly with respect to options order handling rules governing best execution, limit order display, priority rules, trade reporting and firm quotes. It also requires exchanges to report trades within 90 seconds and to enhance incentives to quote competitively, particularly in the context of automatic execution systems. Taken together, these actions constitute a major restructuring of the options industry and a dramatic move toward increasing competition in it.

IV.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court’s determination that the proposed Final Judgment is in the public interest. The Department believes that entry of this Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

Nancy M. Goodman, Chief
Computers and Finance Section
Antitrust Division
U.S. Department of Justice
600 E Street, N.W., Suite 9500
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the Department considered litigation on the merits. The Department rejected that alternative for two reasons. First, a trial would involve substantial cost both to the United States and to the defendants, and is not warranted since the proposed Final Judgment provides all the relief the Government would likely obtain following a successful trial. Second, the Department is satisfied that the various compliance procedures to which defendants have agreed will ensure that the anticompetitive practices alleged in the Complaint are unlikely to recur and, if they do recur, will be punishable by civil or criminal contempt, as appropriate.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed final judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination

> the court *may* consider:
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
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> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals

for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. United States v. Microsoft, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[3] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine

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[3] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also United States v. Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgment, therefore, should not be

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[4] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)." United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Moreover, the court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in the complaint, and does not authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” Microsoft, 56 F.3d at 1459. Since “[t]he court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing the case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. Id.

VIII.

DETERMINATIVE MATERIALS/DOCUMENTS

The Department considers the SEC Order to be a determinative document within the meaning of Section (b) of the APPA, 15 U.S.C.§ 16(b). As noted above, the Department determined that various corrective actions needed to prevent the recurrence of the agreement alleged in the Complaint and to promote competition could best be addressed by the SEC. Absent the SEC Order, the Department would have included additional corrective actions in this settlement. Accordingly, the SEC Order will be filed with this Final Judgment.

Dated: September 11, 2000

Respectfully submitted,

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